



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 302 of 2004

GATIMU FARMERS COMPANY.....PLAINTIFF

VERSUS

GEOFFREY KAGIRI KIMARI.....DEFENDANT

AND

KUNGU KARANJA.....1ST APPLICANT

SAMWEL MBUGUA.....2ND APPLICANT

PAUL GATWA NGANGA.....3RD APPLICANT

RULING

The applicants, Kung'u Karanja, Paul Gatwa and Samuel Mbugua have made an application under the Provisions of **Order XLIV Rules 1, 2 and 3 of the Civil Procedure Rules and Section 8 of the Civil Procedure Act** seeking the order that this court reviews its order issued on the 14th of June, 2005 and the 25th of July, 2005. The application is supported by the annexed affidavit of Kung'u Karanja and the grounds stated on the face of the application. The said grounds are that; the applicants herein were not parties to this suit. The applicants state that the orders issued by Musinga, J. were directed to that the defendant and not the applicants. The applicants were aggrieved that the orders issued by the court on the 14th June, 2005 were issued on a mention date, without any application being made. The applicants were aggrieved that the said order issued against them had been issued before they were given an opportunity to be heard. The applicants further stated that they had not been issued with a notice of penal consequences as required by the Law. The applicants urged the court to allow the application, review and set aside its orders issued on the 14th of June, 2005 and the 7th July, 2005.

The application is opposed. A director of the Plaintiff company Anthony Githiru Ng'ang'a swore an affidavit in opposition to the application. He deponed that the applicants were the former co-directors of the plaintiff company together with the defendant. He deponed that the defendant had used the applicants to shield himself from the order of the court that required him to surrender the documents of the Plaintiff company. He stated that the applicants had admitted being in possession of the documents ordered surrendered to the plaintiff but had refused to surrender the same even after being warned by the court of the consequences of their refusal to abide by the order of the court. The plaintiff urged the court to dismiss the application with costs as the applicants had rightly been committed to civil jail after they had refused to abide by the orders of the court.

I heard the submissions made by Mr. Konosi, learned counsel for the applicants, Miss Mathenge learned counsel for the defendant and Mr. Karanja learned counsel for the Plaintiff, when the application came up for hearing. I have carefully considered the said submissions made. I have also considered the application and the affidavits filed either in support or in opposition of the application. The issue for determination by

this court is whether the applicants have established a case to enable this court review its orders dated the 14th of June, 2005 and the 30th of June, 2005.

What are the orders complained of and what led to the said orders being issued by this court? The defendant Geoffrey Kagiri Kimari was ordered by Musinga J on the 3rd of May, 2005 to surrender the head title of L.R. No.8662/2, company seal, rubber stamps, company registers, records of annual returns, cash books, receipt books, account books, bank statements, minutes books, original certificate of the company's incorporation, the company's forms and any other document relevant to the company in possession of the defendant. The company referred in the said order was Gatimu Farmers Company Limited (The plaintiff in this case). The defendant was required to surrender the said items within ten (10) days of the issuance of the said order. The defendant did not comply. Instead he made an application to have the said orders set aside or vacated.

When the said application was listed for hearing before this court, the defendant was ordered to comply first with the order of Musinga, J. before his application could be heard. This was in line with decision of the Court of Appeal in Dorothy K. Kwonyike t/a Luguyan Enterprises –vs- Victoria Commercial Bank Ltd. – Civil Application No. NAI 79 of 2000 (UR 35/200) C.A. (Nairobi) (unreported) where it was held that a litigant who had been ordered to comply with a certain order of the court cannot be given audience by the court until and unless he complies with the said court order issued. (See also Mawani Vs Mawani [1977] KLR. 159). The defendant was then ordered by this court to comply with the order issued by Musinga J. The defendant did partially comply with the said order. He however did not surrender all the items and documents ordered by the court.

On the 14th of June, 2005, when the defendant appeared before this court, he told the court that he could not comply with the order of the court because the said items and documents were in the possession of Kariuki Ngure, Samuel Mbugua, Peter Gatwa and Kung'u Karanja. It emerged from the affidavit filed in the application now before court that the four were former directors of the plaintiff company. This court ordered the persons mentioned to appear before court on the 30th of June, 2005 and comply with the said orders issued by Musinga J. On the 30th of June, 2005, in spite of being served with the order of this court together with the order issued by Musinga J on the 3rd of May, 2005, the said four persons (three of whom are the applicants in this case) failed to attend court. Neither did they comply with the orders of the court issued. This court issued a warrant for the arrest of the four persons named by the defendant.

Three of the four persons named were arrested and brought to court on the 7th of July, 2005 pursuant to the warrants of arrest issued. When the applicants were asked by the court if they would comply with said orders of the court, Samuel Mbugua replied as follows:

“We have the Seal and the documents of the company but we are not ready to surrender it to the court like that. I need to consult my lawyer”

Kung'u Karanja said that:

“I have the books. I will not give out the books. To give the books will be akin to a goat being given to a lion. I will not surrender the books”

Paul Gatwe Nganga told the court he did not know where the books were. It is pursuant to the answers given to the court by the applicants that this court, having found the applicants to be in blatant and brazen contempt of the court, ordered the applicants to be committed to civil jail for an initial period of thirty (30) days. Now the applicants want the said order issued by this court to be set aside. They have stated that they have been made to suffer penal consequences when in fact they were not parties to the suit. It is their case that they were not served with the order, and neither were they served with the notice of penal consequences. The applicants are aggrieved that this court ordered their arrest and subsequent incarceration for contempt of court before they were given an opportunity to explain their case. I have carefully considered the said submissions made by the applicant. The power of this court to punish for contempt of court is provided by **section 5** of the **Judicature Act. Section 5(1)** of the **said act** provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the rime being possessed by the High Court of justice in England, and that power shall be extended to upholding the authority and the dignity of subordinate court.”

In the present case, the two of the of the applicants are not denying that they are possessed of the items and the documents ordered to be surrendered to the plaintiff by this court. The said applicants insisted that they would not surrender the said items even after being served with an order of this court. From my evaluation of the submissions made and the affidavit sworn by Samuel Mbugua, it is evident that the applicants were under the mistaken belief that since they were not parties to this suit, then they would not be bound by the orders of this court even if the defendant himself stated to this court that the applicants were in possession of the said documents. The Hallmark for the success of any judicial system is the respect of the law and the orders issued by the courts of law.

The orders issued by the courts have to be obeyed even by persons who are not parties to the suit but whose conduct or behaviour is affected by the said order issued. In the present case, the defendant and the applicants are former directors of the Plaintiff company. They were ordered by this court to surrender certain documents, the company seal and the rubber stamps to the plaintiff. The defendant duly surrendered the documents that were in his possession. He could not surrender the other items because the same were in the possession of the applicants. The applicants were served with the order of this court and ordered to appear before this court with a view of complying with the said orders issued. The applicants deliberately failed to appear before court. Warrants of arrest were issued. The applicants were arrested. When they appeared before court, two of the applicants admitted to be in possession of the documents but blatantly refused to surrender them. When they were committed to civil jail for contempt of the orders of the court, applicants now complain that their rights were infringed.

Having carefully considered the facts of this case, it is clear that when a person who seeks to obstruct the course of justice by deliberately disobeying an order of the court ostensibly because he claims he was not a party to the suit in which the said orders were issued, cannot blame the court if he is punished for contempt of court. Orders issued by courts binds not only the parties to the suit but all those persons who are made aware of the said order issued. Any person who becomes aware of such an order of the court and deliberately disobeys it is liable to be punished for contempt of court. As is stated in **Halbury's Law of England, 4th Edition Volume 9, paragraph 65:**

“Where an order requires a person to abstain from doing act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, Telegraph and otherwise.”

The most important aspect of obedience of an order of the court is knowledge. If a person becomes aware of an order of the court which binds him, he has no option but to obey it. Such person need not be a party to the suit. If he chooses to disobey such an order of the court, he shall be punished for being in contempt of the said order. This court is aware of the principles laid down in the case of *Re Maria Annie Davis* [1889] 21 QBD 236 which requires this court to sparingly exercise its jurisdiction to commit a contemnor to civil jail for contempt of court in civil cases especially where other remedies may be available. In the present case, the two applicants who admitted that they were possessed of the items and documents required surrendered by the court have an option to exercise. Any time that they are willing to surrender the said items and documents ordered by this court, they shall be released from prison. The two applicants had an opportunity to purge their contempt of this court. They spurned the offer. They shall remain in prison until they see the wisdom of obeying the orders of this court.

It is no defence to a person who is aware of a court order and has deliberately chosen to disobey it to plead that he is not a party to the suit. The Court of Appeal in *Isaiah Kiplagat & two others –versus- Eric Keter C.A. Civil Application No. NAI. 239 of 2000 (UR 111/2000) (Nairobi) (Unreported)* held that a court can make an order binding persons who are not parties to a suit if it appears that the person whom the order is directed to seeks to evade to giving effect to the said order issued by hiding behind such persons.. The above decision squarely covers the circumstances of this case. As former co-directors of the plaintiff company, the applicants cannot hide behind the fact that they are not parties to this suit to avoid giving effect to the orders issued by this court. The two applicants – Samuel Mbugua and Kung'u Karanja must comply with the orders of this court. For the reasons stated, the application filed by the two

applicants lacks merit and the same is dismissed with costs to the Plaintiff. Unlike other convicts, the said two applicants have the privilege of holding the key to their release from Prisons; they can open the doors of the Prison and get their freedom any time they wish.. They have only to purge their contempt of this court and surrender the items and all the documents ordered by Musinga, J. In this regard, there will be no two ways about it.

As regard Paul Gatwe Ng'ang'a, since he told this court that he was not aware of the whereabouts of the said documents, he is ordered released from prison forthwith as he has demonstrated that he was not in contempt of the orders of this court.

DATED at NAKURU this 27th day of July, 2005.

L. KIMARU

JUDGE